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## Legal Aspects of the Ohio Executive Veto\*

ALONZO H. TUTTLE†

In a previous article in this magazine an attempt was made to trace historically the development of the veto power of the governor in Ohio. A few of the legal questions arising out of the exercise of that power will be discussed here.

### I — BE PRESENTED TO THE GOVERNOR

The first sentence in Art. II, Sec. 16 in the Ohio Constitution reads: "Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval." A similar provision is found in practically every other state constitution.

It becomes necessary at times to fix the exact time or at least the exact day when such presentation takes place, since legal consequences are attendant thereon, for another sentence in that same paragraph reads: "If a bill shall not be returned by the governor within ten days( Sundays excepted) after being presented to him it shall become a law in like manner as if he had signed it."

When then is a bill "presented to the governor"? This provision has been held to be mandatory and since the constitution itself gives no answer it is left to judicial interpretation. "It

\* Professor Tuttle discussed the historical aspects of the "Executive Veto" in 2 Ohio St. L.J. 99.

† Professor of Law, Ohio State University.

might be merely exhibited to that officer" said the California supreme court "and even if it should be immediately thereafter taken or withdrawn it might be contended that it had nevertheless been presented within the very letter of the constitution." We would all agree with that court when it adds: "We would instinctively regard such a presentation as being fictitious — merely spurious." Especially would such an interpretation be absurd in Ohio where the constitutional provision reads: "Presented to the governor *for his approval*."

The question usually arises where the bill has not been presented to the governor in person but left in his office in his absence and the governor claims that he has the full time allowed by the constitution for his consideration after it has come to him in person. The Massachusetts court has consistently upheld this contention. In *Dimich v. Barry* (211 Mass. 166) that court said: "The act of the legislative body does not begin to run until the legislative act has come to him in fact and no constructive or implied action falling short of a physical putting before him suffices." Several courts have cited the Massachusetts court's position with approval but more courts have favored the opinion of the New Hampshire court in the *Soldiers Voters Case* (45 N.H. 611) which says: "When was this bill presented to the governor? If there can be no presentation of a bill until it is put into his own hands, then it was not presented until Thursday, August 18th. But it would be absurd to hold that the officers of the senate and house of representatives are obliged to order to perform their duty to follow the governor wherever he may chance to go \*\* and present bills to him in person."

There are few clear cut decisions upon this question. Most of the opinions as Oliver P. Field has said (56 Am. Law Review 898), savor more of policy than of law. He suggests that it might be wise for constitution makers to put at rest the conflict of opinion which exists upon this point.

The most satisfactory decision is that of the Kentucky supreme court in a fairly recent opinion (*Cammack, Atty. Gen. v.*

*Harris*, 234 Ky. 846). The facts of the case are interesting and show how this question often arises. The statutes of Kentucky provide that it shall be lawful to close all public offices on Saturday afternoons, but it was the practice of the governor to be in his office these afternoons. On Saturday, March 8th, 1930, the clerk of the House at 3 P. M. delivered to the office of the governor a bill, but found the office closed. Not obtaining admission, he announced in a voice loud enough to have been heard within, that the clerk of the house of representatives was there and had with him House Bill No. 559 and desired to deliver it to the governor for his approval or disapproval. The governor was in his office until 2 o'clock when he told his staff that on account of the adjourning of the legislature and the consequent volume of business on Monday, he would suggest that the office be closed for the rest of the day. The governor left the office about 2:30 P. M. and went for a ride through the city. Monday, the 10th, the bill was again presented to the office of the governor, but his secretary who was authorized to receive bills refused under instructions from the governor to accept the bill because of a notation on the bill that it had been presented March 8th. On the 12th the bill was again presented and this time received by the governor. On March 20th the governor vetoed the bill. If there was a presentation on March 8th the veto was void because of its being made more than ten days after presentation. The court upheld the veto on the ground that there was no presentation on March 8th, saying: "No method of presentation being given, it is for the courts to determine when the provision has been complied with. The court is not inclined to undertake the establishment of a fixed rule of procedure or to define the term, preferring rather to decide each case as it may arise according to the particular circumstances. There being no indication that the governor or his authorized agents were evading presentation of the bill, due consideration to the usual manner of transacting business between individuals with an honesty of purpose to cooperate harmoniously impels the court to the conclusion that the bill

was not presented to the governor on March 8th in a way intended by the constitution or in a manner sanctioned by ordinary business practice.”

Sometimes the determination of the time of presentation is made a question of proof—of the admissibility of parol evidence to contradict an official record. It became such in an unusual case in Ohio. Governor Pattison, elected in 1905, was desperately ill at the time of his inauguration and never functioned as governor thereafter. For a long time before his death he was practically unconscious. In the meantime bills were being passed by the general assembly and sent to the governor's office where they were recorded in the “governor's book” as having been presented to the governor. This book was provided for by statute though there was nothing in the statute specifically requiring recording in this book the time or fact of presentation of bills to the governor. An attempt was made by parol evidence to contradict this record and to show that due to the well known physical condition of the governor no bill had or could have been presented to him for his approval. This evidence the Ohio supreme court (*Wrade v. Richardson*, 77 Ohio St. 181) held was inadmissible. The court was careful to put its decision on this ground. “It may, however, be useful,” says Judge Shauck, “to add that the foregoing observations are intended to be restricted to the requirements of the present case. We do not consider whether in the absence of the records in the office of the governor the fact of presentation to the governor should not be regarded as established by the legislative journals and the records of the secretary of state.” The Ohio supreme court seems to make the matter of the time and fact of presentation one entirely to be determined by official records and is not disturbed by the fact that it knew as everyone else knew that the mandatory provision of the constitution in regard to presentation of bills to the governor for his approval was in this instance being totally denied.

## II — GENERAL ASSEMBLY BY ADJOURNMENT PREVENTS ITS RETURN

In Art. II, Sec. 16 is another sentence, part of which has already been quoted, in regard to the veto power which needs interpretation. This sentence reads: "If a bill shall not be returned after being presented to him, it shall become a law in like manner as if he had signed it *unless the general assembly by adjournment prevents its return*, in which case it shall become a law unless within ten days after such adjournment it shall be filed by him with his objections in writing in the office of the secretary of state."

What is meant by the clause "unless the general assembly by adjournment prevents its return"? Does this mean final adjournment only, or does it include a case where the general assembly has recessed or adjourned for a limited period of time, and during the recess, when the general assembly is not in active session the ten days allowed the governor for consideration has expired? Has the general assembly in this situation by its adjournment prevented the return of the bill by the governor?

The supreme court of Alabama in *ex rel Crenshaw v. Joseph* (175 Ala. 579) states that the authorities are unanimous in holding that the adjournment by the legislatures contemplated in a constitutional provision of the kind is a final adjournment. As is so often the case when a court talks about the authorities being unanimous, a little investigation would have shown that such was not the case. A few states follow an opinion to the contrary expressed in the leading case of *In re Public Utility Board* (83 N.J.L. 303). In spite of a statement, however, of the U. S. Supreme Court that the decisions among the state courts on this point are in great conflict there can be no doubt that the Tennessee decision represents the great weight of authority among the state courts. Said the Minnesota supreme court in *State ex rel Putnam v. Holm* (172 Minn. 162), "The New Jersey case is not now, nor was it at the time it was written, in accord with the prevailing rule. It did not mention the sev-

eral prior contrary decisions of the courts. The prevailing rule is that a temporary adjournment of the legislature or of a house in which a bill originated does not prevent the return of the bill." The Ohio supreme court has not decided the question for Ohio but there is an opinion of the attorney general given in 1919 in response to an inquiry from Governor Cox. Said the attorney general, "The word adjournment as used in Sec. 16 of Article II of the State Constitution means the final adjournment of the general assembly. During a temporary adjournment of both houses of the general assembly to a day beyond the time within which the Governor is required to return a bill which he does not approve, the governor in case he desires to exercise his veto power should return the bill with his objections in writing to the clerk of the house in which the bill originated within ten days (Sundays excepted) after it has been presented to him for approval. A return to the clerk during such adjournment is a return to the house within the meaning of section 16 of Article II."

The question would seem therefore to be settled were it not for an important recent decision of the U. S. supreme court involving a similar provision of the federal constitution. The case is that of *Okonogan Indians v. U. S.* (279 U. S. 655) decided in 1929 and arose over the question whether an interim adjournment of congress at the end of the first session was an adjournment which made legal a pocket veto because of the fact that such an adjournment prevented the return of a bill by the president to the house of its origin. The court, holding that the interim adjournment had this effect stresses the fact that "this view is supported by the practical construction given to the constitutional provision by the president through a long course of years in which congress has acquiesced." It also notes that congress has never enacted a statute authorizing an officer or agent of either house to receive bills returned by the president during this adjournment and there is no rule to that effect in either house. It also thinks important the provision that when the president has returned a bill to the house of its origin that

house shall enter its objections at large on the journal and proceed to consider it. For these and other reasons ably presented by Justice Sanford the court comes to the conclusion that, "from a consideration of the entire clause we think the 'House' to which the bill is to be returned is the House in session. \*\*\* It follows in our opinion that under the constitutional mandate it is to be returned to the house when sitting in an organized capacity for the transaction of business \*\*\* and that no return can be made to the house when it is not in session as a collective body and its members are dispersed."

The reasoning leading to the conclusion that only a "final" adjournment prevents a return of a bill by the executive is found in the decision of the supreme court of Tennessee in the case of *Johnson City v. Eastern Electric Co* (133 Tenn. 632) which says, "if the return must be made to the House when a quorum of its membership is present, then the meaning of the phrase in the above section 'unless the general assembly by its adjournment prevents its return' is that any adjournment which would result in the absence of a quorum would be such an adjournment as would prevent the return of a bill and therefore it would result that the governor could not return a bill if the house in which it originated had adjourned for midday luncheon or had adjourned at night until the next morning." This court analyzes the few cases holding the contrary view and finds that the "conflict is very slight if it may be said to exist." It concludes: "There is no warrant in the constitution for the idea that a session of the general assembly ends with each temporary adjournment. If the intent of the framers of the constitution had been that a mere temporary adjournment of the house in which a bill originated could prevent its return by the governor within the time limited no reason can be imagined for their failure to express the idea in plain terms. The words 'general assembly' should have been omitted if such was the intent and the words 'the house in which the bill originated' should have been substituted in lieu." The point made by the U. S. supreme court that no constitutional or statutory provision is made for agents

of either house receiving a bill returned by the president is answered by saying: "The house in which a bill originates is a parliamentary body and must so far as the manual possession of its journals, bills \*\* and the like be represented by agents. \*\* Although a house in which a bill originated might be an open session \*\* it could only gain knowledge of the fact that the bill was returned by the governor through the manual act of some agent of the house. In other words, if the bill should be returned by the governor with his objection to the house in which it originated, while the house was in open session, the messenger from the governor would doubtless deliver manual possession of the bill to the clerk of the house, to the speaker of the house, or to some member of the committee on enrolled bills and by means of this individual agency so selected the house would gain intelligence of the fact that the bill had been returned. These considerations demonstrate that it could not have been the intent of the framers that the return of the bill could only be made while the house in which the bill originated was in open meeting with a quorum present. Nothing could be accomplished by a return of this character which could not be equally well accomplished in any one of the other modes above indicated."

The Minneapolis supreme court in 1927 in *State ex rel Putnam v. Holm* (172 Minn. 162) agrees with the Tennessee court in thinking that "there is no substantial reason for a bill being returned to the house while in actual session." \*\* The presiding officer, secretary (or clerk) and members of either house are its authorized representatives. Each member is an agent of the particular house to the extent of being a proper person to whom the governor may make such a return."

In determining which view to follow the federal supreme court furnishes the proper test in saying "We think that under the constitutional provision the determinative question in reference to an 'adjournment' of congress is not whether it is a final adjournment or an interim adjournment \*\* but whether it is one that 'prevents' the president from returning a bill to



the house in which it originated within the time allowed." It also speaks of the decisions in state courts as not being helpful "due as they were in some part to differences in phraseology or their application to the procedure of the state legislature."

Following this method of approach it may not be difficult to reconcile the two views, for the fact situation in the federal and state cases is very different. The federal supreme court is talking about an adjournment at the end of the first session of congress, while in the state decisions the discussion is about an interim adjournment for a relatively brief period of time, during the regular session. In the federal legislative procedure there are two sessions of each congress corresponding to the two year term. The statutes at large classify the statutes passed as belonging to the first or second session. In a very real sense then the adjournment of the first session of congress has about it a sense of finality which does not exist in the brief interim adjournments of a state legislature. It would seem, therefore, entirely reasonable to say as does the federal supreme court that when congress adjourns its first session and its members all go home to return at a date permanently fixed by the constitution unless congress "shall by law appoint a different day" it is such an adjournment as prevents the president making a return with his veto of a bill to the house of its origin. Would the court have said the same thing about an adjournment of congress from Friday morning until Monday morning if the ten days allowed the president had elapsed on Saturday? A literal interpretation of the constitution would compel the legislative body to remain in continuous active session for the executive need not wait for ten days to return the bill but may do so at any time after it has been presented to him and if the legislature should adjourn for a day or even for lunch as suggested by the Tennessee court, the executive might desire to return it at that time and claim that he was prevented from doing so because the legislative body was adjourned. This of course is not a reasonable interpretation but it does show that to prevent by adjournment a return there must be a total impossibility of such return.

Another difference in the fact situation is seen in the statement of the federal supreme court that its view "is supported by the practical construction given to the constitutional provision by the president through a long course of years in which congress has acquiesced." The practical construction given the similar provision in the Ohio Constitution by its governor has until this year been the opposite.

Governor Cox in his inquiry to the attorney general in 1919 referred to above makes this clear when he says, "with regard to certain bills filed with me for consideration on the 16th of April, I may desire to exercise the power of disapproval conferred on me by Sec. 16 of Art. II of the Constitution. If at all consistent with my proper course of procedure under the section referred to I want to make certain that the right of the general assembly to renew my action shall be preserved. As you know the legislature adjourned on April 17th and will not convene until the 5th of May next."

It was as stated above in answer to this inquiry that the attorney general ruled that an interim adjournment did not prevent a return of the bill to the legislature:

A still more fundamental difference in the fact situation is seen in the difference between the federal attitude and the Ohio attitude toward the executive veto.

It has been said that the wording of the Ohio and the federal constitution about adjournment is identical. The results, however, are different. In the federal constitution the effect is to kill the bill unless signed by the president. In the Ohio constitution the effect is to make the bill a law unless vetoed by the governor. The difference may not be great but it does show a difference in attitude toward adjournment and veto. The federal constitution accepts the death of bills left in the hands of the executive at the time of adjournment. The Ohio constitution assumes no such result but rather the opposite and puts the burden on the governor.

This reluctance to accept an absolute veto by the governor in Ohio is borne out by the history of the veto power. For over

a hundred years as pointed out before no veto power was provided for. When first given it was with the proviso that in case it was exercised after adjournment it should be filed with his reasons with the secretary of state who should present it to the next session of the general assembly. When the present veto provision was adopted by the convention of 1912 it was to limit the veto power then existing, not to enlarge it. The provision about his veto, filed in the office of the secretary of state, being presented for approval to the next general assembly was omitted because it was felt that it had proved to be unworkable, and every reason given to show that it was unworkable was based upon the idea that in every case of such a "filing" there had been a final adjournment. In debating this provision in the convention the following discussion took place:

MR. WOODS:

When the governor vetoes a bill after the general assembly adjourns, what becomes of the bill?

MR. DOTY:

They have never found out what they do with it. The governor, I believe, sends it up to the next house or senate, as the case may be, in the next general assembly.

MR. WOODS:

Can they not act on it?

MR. DOTY:

You know as a lawyer that they cannot. You have to return it to the house in which it originated. When the legislature has adjourned and when it is sent back to the next general assembly in which it originated it is out of existence.

Again in discussing the proposed veto amendment:

MR. JOHNSON:

No, there is nothing arbitrary about the veto unless the general assembly should rush some bills through at the end of the session so that the governor could not report it before adjournment. \*\* What is an absolute veto? It is one that cannot be overcome. The governor has no veto of that kind as proposed in the amendment.

MR. DOTY:

The general assembly adjourns today at noon *sine die*. \*\* The leg-

islature having adjourned *sine die* will have no chance to review the governor's veto.

MR. JOHNSON:

The legislature has the remedy in its hands of refusing to sign any laws during the last ten days of the session.

When we realize that aside from the debate over the question whether there should be any executive veto at all, the main debate in the convention of 1912 was whether an absolute veto was inadvertently being given under a possible situation and that the only possible situation conjured up by Mr. Doty, who was raising the spectre of a possible absolute veto power was after a final adjournment, we realize that there could not possibly have been any intent to confer such an absolute power of veto after a temporary adjournment when a date was fixed for reconvening within a short time. There is a vast difference between this background and that seen in the federal constitutional convention of 1787 when the debate over the executive veto was whether it should be an absolute veto power or the one now provided for.

For these important differences between the fact situation in Ohio and in the federal government it is not unreasonable to say of the federal decision as it says of the state decisions that "it is not very helpful in deciding the question" as it arises in this state and that when the question comes before the Ohio supreme court for settlement it will be justified in following the reasoning of the various state courts and the opinion of its attorney general.

The above discussion has a very vital bearing upon the question of the legality of an important recent veto of the governor of Ohio and the conclusion if sound would mean that the veto was void.

The special session of the general assembly of Ohio recessed January 28th, 1936, until February 25th. The sundries appropriation bill was received by the governor January 28th. When the ten days allowed by the constitution for consideration was up, the general assembly was not in active session and the

members were dispersed. The governor, believing that under the circumstances he was prevented from returning the bill to the house of its origin filed the bill with his approval, but with various "items" vetoed, in the office of the secretary of state, thus preventing the items vetoed being repassed by the general assembly; in effect amounting to an absolute veto. The validity of this veto will of course depend upon whether the reasoning of the federal supreme court or that of the state supreme court is followed.

An additional argument could be made to justify this filing and that is that this bill was a bill approved and therefore had to be filed under the wording of Art. 16 that "if he approves he shall sign it and thereupon it shall become a law and be filed with the secretary of state." Since the bill presented to the governor, it is argued, is one bill and cannot be divided and since the bill is generally approved, the approved bill must be filed and carries along with it the items vetoed. The wording of the constitution is unfortunate, but the meaning is clear. "Items so disapproved shall be void unless repassed in the manner herein prescribed for the repassing of a bill" reads the provision. The above argument proves too much for it would render this provision inoperative since no item vetoes would ever have to be returned, being always parts of bills generally approved. The constitution does not make the filing essential to the going into effect of a bill approved but it does require that an opportunity be given to reconsider vetoed items. It does not specify when an approved bill shall be filed or by whom. The constitution moreover does not require that the bill must be returned but only that the "item or items so disapproved shall be void unless repassed in the manner prescribed for the repassage of a bill." It would therefore be proper for the governor to return the bill with the items vetoed to the house of its origin, for action by that house on the items vetoed and after such action the bill approved could be filed in the office of the secretary of state, or it would be equally proper for the governor, by message, to inform the house of its origin of his action on the bill

and the items vetoed so that having the item vetoes officially before it, a repassing might be made "in the manner prescribed for the repassage of a bill." Only in some such manner is it possible for the constitutional mandate making it necessary for an opportunity to repass vetoed items to be carried out.

This argument would seem, therefore, to have no force and makes the question of the validity of the governor's veto of the items in the sundries appropriation bill depend entirely upon whether the reasoning of the federal or state courts is followed. If the argument is sound that the reasoning of the state courts to the effect that adjournment means only final adjournment ought to be followed in Ohio, then the veto was void.

While this is so it is also so that the supreme court of Ohio is very loath to disagree with a conclusion reached by the federal supreme court and might be inclined to follow it even though the important differences between the federal and Ohio situation were recognized.

Some significance also should be given to the fact that the governor's veto under discussion was not protested but was by its silence accepted by the general assembly. It cannot be said therefore that the entire practice in Ohio has been to the contrary. It is true that until this veto and its tacit acceptance the practice was to the contrary. It is believed no such veto was ever filed before and the accepted practice in Ohio is expressed in the refusal of Governor Cox under advice of his attorney general to so act. Since the federal supreme court gives considerable weight to the accepted federal practice in the matter, the very fact that the veto was not protested has some bearing upon its validity, though a single veto not protested cannot be said to establish a practice especially when the previous established practice was to the contrary.

## III — TEN DAYS AFTER ADJOURNMENT

The clause in Art. XVI which reads "in which case it shall become a law *unless within ten days after such adjournment* it shall be filed by him with his objections in writing in the office of the secretary of state" will some day have to be given, by our supreme court, a definite meaning particularly that part which fixes "ten days after adjournment" as the limit of time for a veto.

Ordinarily no question would arise for all such bills are usually presented to the governor at or immediately after the time of adjournment and the governor has the full ten days for consideration. Sometimes, however, this is not the case. Many bills are passed on the last day of the session. There may be delay on the part of the legislative officials in getting the bill presented to the governor. Does the governor have the full ten days after adjournment? Even more serious is the situation where the legislature by the device of stopping the clock prolongs the session after the official time of adjournment. The journals of the two houses record the adjournment at a certain time on a certain day. As a matter of fact the legislature, the clock being stopped, remains in session hours and sometimes days after such official time of adjournment, continuing to pass bills and do other business. The time of presentation of a bill to the governor may under these circumstances be days after the official adjournment so if the governor must exercise his veto within ten days after such official adjournment he does not have anywhere near his ten days for consideration. As a matter of fact the legislature may remain in actual session ten days or more after official adjournment in which case if the ten-day clause is literally followed, the ten-day period is up before the governor even gets the bill and his veto power is completely denied. To give this interpretation to the clause would moreover, in effect, make another clause of the same article inoperative, viz., the clause which reads: "Every bill passed by the general assembly shall before it becomes a law be *presented to the governor for his approval.*"

Since the veto power is held to be a part of the legislative function it would follow that presentation to the governor for his approval is as necessary to the enactment of a law as is its passage by the legislature. It would seem therefore that a sensible construction would be one that would attempt to construe the article as a whole and to enforce all its provisions. This could be done by holding the clause "ten days after adjournment" to be apposite to a situation where the bill being in the governor's hands and under his examination, the general assembly adjourns.

In this case he would have ten days after such adjournment. There is no apparent purpose for ever denying the governor ample time for consideration of a bill. Ample time in this article is defined to be ten days. The intent of the clause must therefore be to increase under some circumstances the time allowed for examination but never to decrease it. This interpretation is borne out by the structure of the veto paragraph. It reads "if a bill shall not be returned by the governor within ten days \*\* after being presented to him it shall become a law." This, of course, has in mind a situation where the legislature is in session and then realizing that within this ten-day period the legislature might adjourn, it provides in the same sentence that in such a case "it shall become a law unless within ten days after *such adjournment* it shall be filed by him," etc.

This would seem to be a plausible interpretation and sensible in its results. There are, however, some defects in its reasoning. If this clause applies only to a situation where the bill is in the governor's hands, while the legislature is in session, what about the situation where bills are passed, as so many are, on the last day of the session and the bills so passed are not presented to the governor until after adjournment? No provision is then made for the situation. It might be argued, however, that, since all bills before they become laws must be presented to the governor for his approval, these bills must be so presented, and though no specified time is fixed within which his approval or disapproval must be exercised, a reasonable



time must be allowed, and since the constitution fixes ten days as being a reasonable time in case the bill comes to him while the legislature is in session, a similar period by analogy should be allowed when the bill comes to him after the session is over. This kind of reasoning by analogy is used by many courts in interpreting the clause, "unless the congress (legislature) by their adjournment prevent its return *in which case it shall not be a law*." Many courts as seen in the previous article have construed these clauses as still giving the executive the power to sign bills after such adjournment but only by analogy within the time provided for such signing while the legislature is in session.

Satisfactory as this interpretation of the words "ten days after adjournment" would seem to be, it has not apparently received the approval of the few courts that have had occasion to discuss it nor does it seem to have been the idea of the members of the convention of 1912 who framed it. In the debate upon the veto proposal the question arose as to whether or not a power of absolute veto was being given the governor on bills coming to him after adjournment. Mr. Doty, a member of the convention, who had also been for several years clerk of the house of representatives and so familiar with the practice of stopping the clock and the passing of many bills at the last moment said, "The general assembly adjourns today at noon *sine die*. *The governor has ten days from today at noon to approve or veto.*" In spite of the fact that the convention was talking about bills that could not be presented to the governor until after adjournment no disapproval of the remarks of Mr. Doty was expressed. The ten-day period after adjournment seems to have been accepted by them as applying to all bills regardless of the time of presentation to the governor.

The decided cases upon the question are few in number, but what there are seem to support this view. In *Dow v. Biedelman* (49 Ark. 325) that court says, "He (governor) is prevented by the adjournment from returning the bill, whether the bill is in his hands before it adjourns or reaches his hands afterwards."

This case also holds that the veto must be exercised within the time fixed by the constitution, in this case it being twenty days after adjournment. In an annotation in 70 A.L.R. 1426 of the case of *Prevestin v. Developing Co.* (112 Conn. 129) we find this statement: "The time within which the governor of a state may, after the adjournment of the legislature, approve a bill passed by it cannot be extended by delay in presenting a bill to him."

The leading and really the only case directly in point is that of *Capito v. Topping* (65 W. Va. 587) decided in 1909. In this case the court is considering the validity of a veto by the governor filed within the period of five days after the actual date of final adjournment but one day more than five days after the date of the official adjournment as recorded in the legislative journals. The constitution of West Virginia is the same as that of Ohio except five days is allowed after adjournment instead of ten. Holding this veto to be invalid as exceeding the time allowed by the constitution the court said: "The common practice of staying the hands of the clock to enable a legislature to effect an adjournment apparently within the time fixed by the constitution for the expiration of the term is dwelt upon in the argument as a serious trespass upon the rights of the executive in respect to the time allowed him for examination and action upon bills undisposed of by him at the time of adjournment; it being pointed out that he might be deprived of the entire period of five days. In point of fact no such serious curtailment of this period has ever occurred in this state. \*\* If it should, the resultant evil might be slight as compared with that of altering the probative force and character of legislative records. \*\* The constitution was adopted by the people with full knowledge of the existence of this rule of evidence and no provision was inserted to protect the governor from its operation and effect."

When the question comes before the Ohio supreme court, as it surely will, the court might do one of four things.

1. It might look back of the records of the legislative jour-

nals and admit parol evidence to determine the actual date of adjournment. This is just what the West Virginia supreme court refused to do and it is almost equally certain that the Ohio supreme court would make the same decision. As pointed out before, it was decided in *Wrade v. Richardson* (77 Ohio St. 181) that parol evidence was inadmissible to refute the record in the governor's office as to the time a bill was presented to the governor. And in *State ex rel Herron v. Smith* (44 Ohio St. 348) it was held that parol evidence could not be admitted to impeach the official record of the legislative journal that a bill had received a concurrence of the number of members required ( $\frac{2}{3}$ ) for its adoption. One wonders how far the courts are willing to carry this doctrine of the conclusiveness of legislative journal records. Suppose the clock is stopped and the legislature continues to pass bills. Criminal statutes are passed. In Ohio such laws do not go into effect upon passage but it is entirely possible to provide that they would. Would a man be found guilty of a crime which was no crime when the act was done under the conclusive presumption from the records that the law was in effect several days before it was really passed. There is an instance recorded in the English State Trials where the doctrine that an act of Parliament took effect from the beginning of the session was used to convict a man of capital offense though the act defining the crime was passed after the deed was done. Of course such a happening would be impossible in Ohio today.

2. It might accept what has been outlined above as being a plausible interpretation with sensible results, viz., that the ten days' limitation after adjournment only applies to a situation where the bill is in the hands of the governor while the legislature is in session and while in his hands and before the ten days allowed is up the legislature adjourns. This interpretation would allow the governor sometimes more than ten days for consideration but never less.

3. It might follow the reasoning of the West Virginia court and enforce the provision literally believing, in case leg-

islative abuse made ineffective the veto power of the governor, the remedy was in the people and not in the courts.

4. It might accept still another view. One expressed in an interesting case in Arkansas (*Monroe v. Green*, 71 Ark. 527). The Arkansas constitution allowed five days for consideration by the governor while the legislature was in session and twenty days after adjournment if by adjournment a return of the bill was presented. In this case the record showed that the legislature adjourned April 29th. One hundred bills were left unengrossed at the time of final adjournment. Not until May 23rd was the bill in proper form presented to the governor. The twenty-day period after adjournment was passed so the court held the time limit for a veto was passed but since the bill was not presented to the governor in time to give him at least the five days fixed by the constitution as a reasonable time for consideration, the other provision in the constitution about the necessity of bills "being presented to the governor" was not met and so the bill failed to become a law. There was a dissenting opinion which took the position that were the case *de novo* it should be held that in no case could a bill become a law unless the presentation was made before final adjournment. If this theory of interpretation of the case should be followed the provision in the Ohio constitution would require the veto to be filed within ten days after adjournment but would also require the bill to be in the hands of the governor for his consideration a reasonable time before the ten days is up. If the reasoning of the Arkansas court is followed that the time fixed in the constitution for consideration when the bill is before the governor while the legislature is in session is the conclusive test of what is a reasonable time, then the bill must in Ohio be before the governor ten days, which would mean that no bills could be presented to him after final adjournment, which of course would make impossible any passing of bills in the interim between official and actual times of adjournment under the device of "stopping the clock."

Should it be objected that this interpretation would result

in many bills which had passed both houses, oftentimes important bills like the appropriation bills, failing to become laws it could be answered in the language of the supreme court of Connecticut cited above (112 Conn. 129). "If in addition legislative practices may have crept in as the attorney general asserts making approval difficult or impractical these may not be used as excuses for their perpetuation but should be corrected to the end that the constitutional provisions should be carried out." The discussion above about the meaning of the words "ten days after such adjournment" has a very definite bearing upon the question of the validity of another of the governor's recent vetoes. This veto was that of certain items in the general appropriation bill (H.B. 531) for the biennium ending December 31, 1936.

The general assembly officially adjourned May 23rd, 1935, and the journals of both houses record this as the date of adjournment. As a matter of fact by the device of stopping the clock on that day the general assembly remained in session until June 4th. The extent of business done after May 23rd is seen in the fact that the senate journal for May 23rd extends from page 765 to page 895. Among the bills passed during this period was the important general appropriation bill. The record shows that it was passed May 23rd, that being the official day of adjournment. It was in fact passed June 4th and was not presented to the governor until some time later. The governor, convinced that under the constitution he had ten days for consideration after presentation, took the full ten days and filed his approval of the bill with many important items vetoed on June 18th. This was within ten days after presentation but more than three weeks after the official date of adjournment. Did this veto meet the requirement of Art. II, Sec. 16, which reads "in which case it shall become a law unless within ten days after such adjournment it shall be filed by him with his objections in writing in the office of the secretary of state"?

The answer to this question will depend of course upon

which one or ones of the four possible interpretations suggested above is followed.

It might follow the first interpretation and, ignoring the official record, find out for itself by other evidence what the real date of adjournment was. This is exactly what the West Virginia supreme court in the case discussed above refused to do and it is not likely that the Ohio supreme court would do so either. The holdings so far are against it but it may become necessary some time for the court to modify these holdings. At the present time this very question is in the courts. A special session of the general assembly recessed July 22nd, 1936, for a technical five-minute recess and stopped the clock. Under a gentleman's agreement, however, members decided not to return until called by the presiding officers. The general assembly did not meet until December 8th and when they did meet on that date the official record showed it was still July 22nd. They could at that time have adopted a motion to adjourn to December 8th, but this would have prevented the members from receiving weekly mileage allowances from and to their homes. Instead the record was made to show that they met and adjourned twice a week during one hundred and forty days of actual recess and for the coming to and going from these mythical sessions the members claimed mileage allowances. They felt, it must be said, some moral justification for this claim, since the many extra sessions had kept them in Columbus such a length of time that the salary allowed was not sufficient to meet their expenses. The members of the general assembly in thus fixing the journal records were of course relying upon the repeated holding of our supreme court that such record cannot be contradicted by other evidence. However the attorney general wrote to the state auditor the following, "Although it is not ordinarily the duty of the auditor to look behind the house and senate journals in matters of this nature the instant case appears to me to be such a flagrant attempt to unlawfully withdraw from the treasury \$21,000 of the taxpayers' money, it is my advice to you that you are perfectly justified and it is your

duty to refuse to pay such alleged mileage unless and until you are ordered to do so by a court of competent jurisdiction."

Experience in some other fields may point the way if it seems desirable to modify this doctrine. For a long time the conclusiveness of a sheriff's return was accepted and in some states is still followed but as Mr. Sunderland says in 30 Columbia Law Review 298, "It thus appears that the common law rule is fast disappearing from our jurisprudence and that the courts have been much more effective reformers than the legislatures." It is interesting to note that at the time of writing this article by Mr. Sutherland (1916) West Virginia, which in the case discussed above so strongly refused to question the conclusiveness of a legislative journal record as to the date of adjournment, was one of the few remaining states which held to the doctrine that the "return of the sheriff cannot be contradicted under any circumstances." (*Talbot v. Oil Co.*, 60 W. Va. 423). Ohio, on the other hand, has held (*Grody v. Gosline and Barbour* 48 Ohio St. 665) the other way.

The statutory experience in Ohio also shows a tendency toward this realistic approach. Ohio G.C. 11656 which, until 1927, read "Such lands and tenements within this county where the judgment is rendered shall be bound for its satisfaction from the first day of the term at which it is rendered \*\*", has been amended (112 Ohio St. 199) to read "shall be bound for its satisfaction from the day on which such judgment is rendered."

Even, however, if our supreme court should reverse itself and follow the first interpretation suggested it would not help settle the question under discussion since the governor's veto was more than ten days after the date even of actual adjournment.

It might follow the second interpretation suggested and if it did it would of course uphold the veto.

If it should agree with the West Virginia court and accept the third interpretation, it would of necessity hold that the veto was void.

If it should follow the reasoning of the Arkansas Court (71

Ark. 527) it would hold that not only was the veto void but that the entire appropriation bill was void as well since the requirement in the constitution that all bills "must be presented to the governor for his approval" was not complied with.

As said above, in spite of the authority to the contrary, it is believed that the second interpretation suggested is the most sensible one and should be adopted by our supreme court. If it is not and the words of the constitution are literally followed as the third interpretation suggests, then it is believed that the fourth interpretation should of necessity be followed also.

If this reasoning is sound then the court should hold either that the veto was valid or, if not, that the entire appropriation bill was void.

#### ITEM VETOES

One other provision in Art. II needs brief mention and that is the one which reads: "The governor may disapprove any item or items in any bill making an appropriation of money and the item or items so disapproved shall be void unless repassed in the manner herein prescribed for the repassage of a bill."

In argument before the supreme court in the case of *State ex rel v. Cont. Bd.* (130 Ohio St. 127) it was urged that an appropriation in a bill of a bulk sum to such a large purpose as "personal services" did not make it possible for the governor to exercise his power to veto items. This was said in justification of the governor's veto of other items with the expectation that the controlling board would transfer funds from "personal service" to the items vetoed, in this way compelling a reduction in the amount appropriated to personal services. In no other way it was argued could the governor really be given the constitutional power to veto items. In deciding as the court did in this case that the controlling board had no power to make such a transfer since it would in effect be overruling the veto of the governor and exercising the power of appropriation itself, the court seemed to give no heed to the argument of counsel mentioned above and did not even mention it in its opinion.



The supreme court of Pennsylvania did hold, in *Commonwealth v. Barnett* (199 Pa. 161), that under a constitutional provision of this kind the governor could reduce the amount appropriated in an item as well as veto it altogether. Said the court, "If the legislature by putting purpose, subject, and amount inseparably together and calling it an item, can coerce the governor to approve the whole or none, then the old evil is revived which this section was meant to destroy. \*\* He was entitled to approve of the object and disapprove as to the amount." This seems to be the only case supporting such an interpretation of the item veto provision. The general view was expressed by the supreme court of Montana where in 1923, in the "veto case" (69 Mont. 325), it said, "The supreme court of a number of states which have constitutional provisions similar or somewhat similar to our own have had occasion to pass upon the subject directly or indirectly. Not one save Pennsylvania has affirmed the right of a governor to scale an item in an appropriation bill. \*\* Since the decision in *Com. v. Barnett*, it has been commented on by many courts. The conclusion reached by the majority in that court has not been followed by any court." The Montana court suggests that in case the legislature passes an omnibus bill without proper itemization the remedy is for the governor to veto the whole bill and call the legislature back in special session to pass the bill in a proper form.

Other questions have arisen in regard to the constitutional veto power. Is it a purely legislative power and as such must be exercised while the legislature is in session? Is the power of veto to be construed liberally as an affirmative power or construed as a negative power and as such confined in its operation strictly to the letter of the grant? These and other questions have been discussed and show how difficult it is to encompass an idea within the limit of words. The language of Art. II, Sec. 16 seems simple and easily understood and yet as seen above every sentence and almost every word has proved to be capable of contrary interpretations.